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Supreme Court of the United States

OCTOBER TERM, 1961

No. 518

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW ROCHELLE, *et al.*,

Petitioners,

—v.—

LESLIE TAYLOR and KEVIN TAYLOR, Minors by WILBERT TAYLOR and HALLIE TAYLOR, their parents and next friends, *et al.*,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Opinions Below

The opinion of the United States Court of Appeals, Second Circuit, is now reported. *Taylor, et al.* v. *Board of Education of the City School District of the City of New Rochelle, et al.*, 294 F. 2d 36 (1961).

The opinion of the District Court dealing with the plan is also now reported. *Taylor, et al.* v. *Board of Education of the City School District of the City of New Rochelle, et al.*, 195 F. Supp. 231 (S. D. N. Y. 1961). The first opinion of the District Court is cited in the Petition.

Question Presented

Whether where the two courts below held that segregation at the Lincoln School was not a fortuity but was deliberately created and maintained by petitioner-school authorities, principles enunciated by this Court in *Brown* v. *Board of Education of Topeka*, 347 U. S. 483 (1954), *Brown* v. *Board of Education of Topeka*, 349 U. S. 294 (1955), and *Cooper* v. *Aaron*, 358 U. S. 1, 7 (1958) were properly applied?

The Constitutional Provisions Involved

This case involves the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

Statement of the Case

Petitioners seek review of the judgment of the United States Court of Appeals, Second Circuit, affirming the judgments of the United States District Court, Southern District, New York, which, relying primarily upon *Brown* v. *Board of Education of Topeka*, 347 U. S. 483 (1954), held that rights secured to infant respondents by the equal protection clause had been violated by petitioners in requiring respondents to attend the Lincoln elementary school in the City of New Rochelle.

The District Court's holding was based upon two principal findings: (1) petitioners had, prior to 1949, intentionally created Lincoln School as a racially segregated school, and had not since then acted in good faith to achieve desegregation as required by the Fourteenth Amendment; and (2) petitioners' conduct, since 1949, had been motivated by the purposeful desire to maintain the Lincoln School as a racially segregated school.

These principal findings, affirmed by the court below, were supported by numerous more detailed findings in the first trial court opinion which, together with that court's holding, formed the basis of a decree entered by it on January 24, 1961, suggesting that petitioners submit a plan, by April 14, 1961, for desegregating the Lincoln School, commencing with the 1961-62 school year. *Taylor, et al. v. Board of Education of the City School District of the City of New Rochelle, et al.*, 191 F. Supp. 181 (S. D. N. Y. 1961).

Petitioners appealed to the court below from this decree. Their appeal was dismissed as premature on April 13, 1961. *Taylor, et al. v. Board of Education of the City School District of the City of New Rochelle, et al.*, 288 F. 2d 600 (2nd Cir. 1961).

Thereafter, on May 3, 1961, pursuant to an extension of time granted by the court below, plans were presented to the trial court. The plan of the majority of petitioner board provided for voluntary transfer of children residing in the Lincoln School attendance area to any of the other eleven elementary schools in New Rochelle upon fulfillment of a number of conditions precedent. Most of these prerequisites were stricken by the court, for reasons set forth in its second opinion, and a decree was entered by it on May 31, 1961 directing implementation of the plan as judicially amended. *Taylor, et al. v. Board of Education of the City School District of the City of New Rochelle, et al.*, 195 F. Supp. 231 (S. D. N. Y. 1961). A plan of the board minority also was proffered.[1]

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[1] The minority plan also embodied a permissive transfer provision for grades kindergarten through three but did not attach the majority's numerous conditions. It provided for dispersal of grades four through six among other neighboring schools and for rebuilding the Lincoln School on another site by 1964.

Petitioners again appealed to the court below. This time their appeal was heard on the merits and the judgments of the trial court affirmed on August 2, 1961, one judge dissenting.

In affirming, the Court of Appeals ruled: "A major finding of the court below was that the defendant School Board had deliberately created and maintained Lincoln School as a racially segregated school. This crucial finding is, we conclude, supported by the record" (294 F. 2d at 38).

Succinctly, the facts of record upon which the major findings depend are:

1. In 1930, when the Webster School was opened, the district lines were gerrymandered to include white pupils in Webster who had been and who normally would have attended Lincoln. As Negroes moved into this area which had been included in the Webster district, the area was restored to the Lincoln district. Later, pupils in the predominantly white Rochelle Park area in the Lincoln district were assigned to the Mayflower School (Appellees' App. pp. 5b-9b).[2]

2. In conjunction with the policy of manipulating the district lines so that as few whites as possible would have to attend Lincoln, school authorities permitted white children living in the Lincoln district to transfer freely to other schools, so that by 1949, the Lincoln School was *100%* Negro (Appellees' App. pp. 9b-12b, 65b, 73b).

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[2] "Appellees' App." refers to appendix to appellees' brief below which is part of record sent to this Court in support of petition for writ of certiorari.

3. As a result of pressures exerted by community groups, the Board, on January 11, 1949, resolved to "study present district lines with a view to setting up school districts in terms of the best interests of all the children and of the most complete utilization of the present physical plant"[3] (Appellants' App. pp. 67a-68a).[4] The resolution also provided, "That as of September 1, 1949, district lines as set by the Board will be strictly adhered to according to best educational practices," and "That effective at once all new entrants to the school system be admitted only to the school of the district in which they legally reside." As a result, a few whites returned to Lincoln.[5] The enrollment there is now 94% Negro.

4. Thereafter, from 1949 to 1960, petitioners studied the Lincoln School problem (Appellants' App. pp. 72a-85a). They hired many specialists who made recommendations, but petitioners never took any action (Appellees' App. pp. 52b-53b, 65b-66b). In 1957 the Board proposed to rebuild Lincoln, which now is delapidated, on the same site without changing the lines or allowing transfers out, contrary to recommendations of specialists which the Board had employed. This proposal was defeated in 1957 by referendum (Appellants' App. p. 77a).

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[3] Resolution of January 11, 1949 is reprinted as Appendix D to Petition for Writ of Certiorari, App. p. 43.

[4] "Appellants' App." refers to appendix to appellants' brief in the court below, which has been sent up to this Court as part of record in support of petition for writ of certiorari.

[5] Some white parents whose children were affected sought, unsuccessfully, to enjoin enforcement of the resolution on the ground that the Lincoln School curriculum was inferior. *McEwan* v. *Brod*, 91 N.Y. Supp. 2d 565 (1949), 97 N.Y. Supp. 2d 917 (1950).

5. In 1959, the Board again proposed to rebuild Lincoln on the same site. This time, however, it proposed to build a smaller school, i.e., a school to accommodate only 400 pupils—Lincoln's present enrollment is 483—and to distribute all those in excess of capacity presently enrolled or to be enrolled among other adjacent schools, contrary to petitioners' own neighborhood school policy which they claim is violated by the trial court's order. This proposal was approved in a special referendum in May 1960 (Appellants' App. pp. 86a-95a, 98a).

6. In the 1960 referendum campaign, the issue, as defined by school personnel, was whether Lincoln should be continued as the City's segregated school or whether all the children assigned thereto should be dispersed among adjacent schools—destroying the "integrated balance" in those schools (Appellees' App. pp. 32b-52b, 64b).

The desegregation plan as amended by the trial court is set forth in its second decree (195 F. Supp. at 240). It was praised below as "noteworthy for its moderation" (294 F. 2d at 39) and has been in effect since September 1961.

Stay pending appeal of the order requiring implementation of the plan was denied by the trial court (195 F. Supp. at 238) and by the Court of Appeals (294 F. 2d at 40). A stay of the mandate of the Court of Appeals was denied by it pending petition for writ of certiorari to this Court on August 17, 1961, one judge dissenting. *Taylor, et al.* v. *Board of Education of the City School District of the City of New Rochelle, et al.*, No. 427, Docket 27055. A stay of the mandate was also denied by Mr. Justice Brennan

on August 30, 1961. *Board of Education of the City School District of the City of New Rochelle, et al. v. Taylor, et al.*, —— U. S. ——, 30 L. W. 2114.

ARGUMENT

I.

The petition for writ of certiorari raises questions of fact which have been decided adversely to petitioners by two courts.

Petitioners seek to have this Court review and set aside the findings of the courts below that the Lincoln School segregation results from the deliberate acts of petitioners and not from happenstance.

The first question presented confirms this: "Is This Truly a Segregation Case and Have Plaintiffs Been Deprived of a Constitutional Right?" (Petition p. 2). For this Court to answer this question in the negative this Court would have to review and hold clearly erroneous the crucial constitutionally relevant findings of fact decided adversely to petitioners by both courts below.

Again, petitioners say (Petition p. 21) "Education in New Rochelle is offered on a non-discriminatory basis, and Exhibit M proves it mathematically (App. F)." Exhibit M is a chart showing enrollment in the New Rochelle schools. In the last column of this chart, the non-white percent of the total enrollment of each school is shown. These non-white percentages range from .25% in the Ward School to 94% in the Lincoln School. Petitioners insist, contrary to the consecutive findings below, that this chart proves there is no racial discrimination in the New Rochelle public school system. Petitioners argue that Lincoln

is 94% non-white as a result of the preponderance of Negroes in the area and the election of eligible white pupils in the district to attend private or parochial schools, not a consequence of action taken by petitioners since 1949.

They contend that since there has been no officially imposed segregation in New Rochelle since 1949, this case involves simply the validity of a pupil assignment regulation, rigidly adhered to since 1949 and reinstituted by petitioners for the purpose of desegregating Lincoln which, at that time, was 100% Negro. Petitioners then urge that the decisions below must rest solely upon the fact that 30 years ago the Lincoln district was created as a segregated district and not on any proof or finding that since 1949 petitioners' conduct has been unconstitutional.

What petitioners overlook, however, is the fact that by 1949, as a result of *their* actions, the Lincoln School had become firmly established in the community as *The Negro School;* that in January 1949 they promised not only rigid adherence to the pupil assignment regulation but a redistricting by September 1, 1949; that from 1949-1960 the promise with respect to redistricting was never fulfilled, despite recommendations for remedying the Lincoln School situation made by Board employed specialists; that in 1960, when the referendum issue was clearly whether Lincoln should be rebuilt on the same site, and admittedly perpetuated as a segregated school, or the children there attending distributed among adjacent schools, thereby increasing the non-white proportions in these schools, petitioners determined to perpetuate the racial situation at Lincoln so that racial balances in neighboring schools not be upset.[6] This determination, made in 1959-1960, and based wholly upon race and color, is constitutionally in-

[6] Appellees' App. pp. 63b-64b, 65b-66b.

valid. *Brown* v. *Board of Education of Topeka, supra; Cooper* v. *Aaron, supra,* at 7. School authorities may not make decisions which would tend to perpetuate segregation. *Boson* v. *Rippy,* 285 F. 2d 43 (5th Cir. 1960) (see particularly supplemental opinion at p. 47).

The decisions below, therefore, do not rest solely upon a finding that in 1930 the Board created a segregated school in New Rochelle. The decisions below are also predicated upon a finding that in 1960 petitioners had an opportunity to choose between segregation and desegregation and chose the former, and, as a palliative, proposed to reduce the capacity of the new Lincoln to 400 and to disperse the excess number of pupils enrolled in Lincoln among other schools in violation of petitioners' own "sacrosanct" neighborhood school policy.

Consequently, in order for this Court to reach the conclusion which petitioners desire with respect to the first question, this Court would have to set aside these findings of the two lower courts.

This Court has consistently ruled that a petition for writ of certiorari will not be granted merely to review the evidence or inferences drawn therefrom, *General Talking Pictures Corp.* v. *Western Electric Co.,* 304 U. S. 175 (1938), or to permit this Court to review facts found by two lower federal courts. *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.,* 336 U. S. 271 (1949).

II.

This Court's decisions in the school segregation cases apply to all state perpetuated racial segregation in the public schools.

In *Brown* v. *Board of Education of Topeka*, 347 U. S. 483 (1954), this Court held officially enforced and officially permitted segregation in the public schools unconstitutional. This holding was reaffirmed in *Brown* v. *Board of Education of Topeka*, 349 U. S. 294 (1955), and in *Cooper* v. *Aaron*, 358 U. S. 1 (1958).

Relying primarily upon these decisions, the trial court held that, under the facts in this case, rights secured to infant respondents by the equal protection clause of the Fourteenth Amendment were being violated by petitioners' requirement that these respondents continue to attend Lincoln School.

The District Court found:

> (1) that the Board of Education of New Rochelle, prior to 1949, intentionally created Lincoln School as a racially segregated school, and has not, since then, acted in good faith to implement desegregation as required by the Fourteenth Amendment; and (2) that the conduct of the Board of Education even since 1949 has been motivated by the purposeful desire of maintaining the Lincoln School as a racially segregated school (191 F. Supp. 181, 183).

Having found these facts, the District Court clearly had no alternative but to apply this Court's teaching in *Brown*.

In its second opinion, the trial court held: "It must again be emphasized that the segregation at the Lincoln

School was not a fortuity; it was deliberately created and maintained by Board conduct." 195 F. Supp. *supra* at 233. In affirming, the Court of Appeals held "The facts recited above showing the Board's acceleration of segregation at Lincoln up to 1949 and its actions since then amounting only to a perpetuation and a freezing in of this condition negate the argument that the present situation in Lincoln School is only the 'chance' or 'inevitable' result of applying a neighborhood school policy to a community where residential patterns show a racial imbalance" (294 F. 2d at 39).

Petitioners argue that this Court should review this case because the complaint attacked the neighborhood school policy. However, it should be noted that petitioners carefully avoid the claim that the trial court held the neighborhood school policy unconstitutional. That the complaint may have sought to have the neighborhood school policy declared unconstitutional is not a reason for granting certiorari. The controlling consideration is that the trial court expressly did not hold the neighborhood school policy, as such, unconstitutional. On March 11, 1961, the trial court said:

> Furthermore, there have been many misconceptions, which I believe in some instances were deliberate, as to the extent of my ruling which have operated to obscure the essential issues involved. For example, I have seen statements that I had in effect abolished the neighborhood school policy. If one reads my opinion, it will be readily apparent that I decided nothing of the sort. Indeed, to characterize the opinion in this manner is a distortion. I did not strike down the neighborhood school policy for the concept of the neighborhood school as an abstract proposition was not even being questioned. But I feel that the com-

> munity has been deliberately confused by these misinterpretations of the opinion. I did hold that this policy, lawful though it be, "is not sacrosanct. It is valid only insofar as it is operated within the confines established by the Constitution. It cannot be used as an instrument to confine Negroes within an area artificially delineated in the first instance by official acts" (Appellants' App. pp. 167a-168a).

In suggesting that petitioners submit a plan, the trial court was guided by this Court's instructions in *Brown* v. *Board of Education of Topeka,* 349 U. S. 294 (1955), reiterated in *Cooper* v. *Aaron,* 358 U. S. 1, 7 (1958). The plan, submitted by the majority of the members of petitioner board, provides for voluntary transfer of pupils from Lincoln to other schools in accordance with terms of the trial court's decree. It does not, as contended by petitioners, enjoin them from rebuilding the Lincoln School or taking any other action designed to bring their operations in line with constitutional requirements.

As the trial court pointed out, the plan adopted will not solve all problems, "But inability to find a perfect answer is hardly justification for refusal to do anything. . . . It hardly need be stated that there is never an ideal solution when the question of desegregation is faced squarely. Experience in the south has made clear, that the problems to be met in this area are most difficult and delicate. . . . Therefore, there can never be a solution which could conceivably please everyone. But, if this alone were sufficient to excuse inaction, progress in this vital area of human rights would be nonexistent . . . " (191 F. Supp. 181, 193).

The plan has been in operation since September 1961. The infant respondents, and others similarly situated,

have transferred to other schools in New Rochelle in accordance with the terms of the decree. To require them to continue to attend Lincoln, against the background of all the facts in this case, would, as the Court of Appeals held, closely approximate the harmful conditions condemned in the *Brown* case.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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